

Fall 1967

# Mutuality of Estoppel-Affirmative Use of Collateral Estoppel- Conflicting Judgments Affecting Similarly Situated Claimants

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## Recommended Citation

Pietz, William R. (1967) "Mutuality of Estoppel-Affirmative Use of Collateral Estoppel- Conflicting Judgments Affecting Similarly Situated Claimants," *Indiana Law Journal*: Vol. 43: Iss. 1, Article 9.

Available at: <http://www.repository.law.indiana.edu/ilj/vol43/iss1/9>

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# RECENT DECISION

## MUTUALITY OF ESTOPPEL—AFFIRMATIVE USE OF COLLATERAL ESTOPPEL—CONFLICTING JUDGMENTS AFFECTING SIMILARLY SITUATED CLAIMANTS

The defendant's jeep collided with plaintiff's truck driven by Farnum. Farnum recovered a 5,000 dollar personal injury award from the defendant and two months later plaintiff began an action for property damage in the amount of 8,250 dollars. Plaintiff's motion for summary judgment<sup>1</sup> on the ground that the judgment in favor of Farnum should be conclusive in plaintiff's action by application of *res judicata* was granted. Since the issues in both actions were identical in that both turned on defendant's negligence and the absence of contributory negligence on Farnum's part, the defendant is bound by the prior determination although plaintiff can not be. *B. R. DeWitt Inc. v. Hall*, 19 N.Y.2d 141, 226 N.E.2d 195, 278 N.Y.S. 2d 596 (1967).

Despite an impressive history of criticism<sup>2</sup> the courts of a generation ago gave uniform respect to the necessity for mutuality of estoppel.<sup>3</sup> This requirement of mutuality has as its proper function the restriction of collateral estoppel<sup>4</sup> to those bounds in which its operation is not inconsistent with the *in personam* nature of a lawsuit.<sup>5</sup>

The past three decades have seen this theory fall into disrepute in several jurisdictions, most notably New York and California. As one often quoted commentator would have it, the landmark 1942 California

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1. N.Y. CIV. PRAC. § 3212 (McKinney 1963).

2. J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 579-0 (1827); Cox, *Res Adjudicata: who Entitled to Plead*, 9 VA. L. REG. (n.s.) 241 (1923); Defending mutuality: von Moschzisker, *Res Judicata*, 38 YALE L. J. 299, 303 (1929).

3. According to the classic formulation of the doctrine, if both parties would not be bound by a prior judgment neither would be. *E.g.*, *Tobin v. McClellan*, 225 Ind. 335, 73 N.E.2d 679 (1947); *Hitt v. Carr*, 62 Ind. App. 80, 109 N.E. 456 (1915); 1 A. FREEMAN, *JUDGMENTS* 428 (5th ed. 1925).

4. By application of the doctrine of collateral estoppel, a party to a lawsuit may be barred from asserting or denying a given issue of law or fact adjudicated in a previous action in which that party or someone in privity with him has participated. 2 A. FREEMAN, *JUDGMENTS* § 639 at 1346-47 (5th ed. 1925). The operation of this "bar" is distinguished from the operation of "merger" in conjunction with *res judicata* which pertains to the attempted second litigation of not a mere issue but of the entire cause of action. If a cause of action is tried, all issues whether or not litigated are merged into the final judgment and may not be reopened, whereas successful invocation of collateral estoppel demands that an identical issue of either law or fact have reached judgment on the merits. *See Cromwell v. County of Sac*, 94 U.S. 351 (1876).

5. Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961) [hereinafter cited as Moore & Currier].

case of *Bernhard v. Bank of America*,<sup>6</sup> "rammed . . . the widest breach in the citadel of mutuality." As will be noted, however, the concept has retained a limited scope of operation. It remained for the New York high court to administer the final blow with *DeWitt*: ". . . mutuality," in the court's words, "is a dead letter."<sup>8</sup>

The very real sense in which the holding may be said to deal mutuality a blow not yet delivered by previous decisions<sup>9</sup> may best be comprehended by ranking those decisions on a scale, the progressions of which represent an increasing divergence from the ideal that each citizen may avail himself of every possible opportunity to present his position in a favorable light. The most common exception to the general rule exists in cases of derivative liability in which a judgment favorable to the party primarily liable forecloses an action by the same plaintiff against the person secondarily liable.<sup>10</sup> The majority reaches the same result although the party secondarily liable was the party sued initially. The inequity is minimal since the claimant has had his day in court.

6. 19 Cal. 2d 807, 122 P.2d 892 (1942).

7. *Zdanok v. Glidden Co.*, 327 F.2d 944, 954 (2d Cir. 1964) (Friendly, J.).

8. *B.R. DeWitt Inc. v. Hall*, 19 N.Y.2d 141, 147, 278 N.Y.S.2d 596, 601, 225 N.E.2d 195, 198 (1967).

The court issued the potentially misleading comment that by virtue of *Bernhard* and its progeny the doctrine had become "so undermined as to be inoperative." *Id.* at 144, 278 N.Y.S.2d at 598, 225 N.E.2d at 196. Such an obituary would be premature if applied to that majority of jurisdictions in which the last decision of record expressly approves the doctrine. For a summary of cases see the appendix compiled in Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 38 (1965); See also Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1956); Moore & Currier, *supra* note 5, at 304. In their two most recent decisions Indiana courts, for example, have remained firmly within the majority camp: *Tobin v. McClellan*, 225 Ind. 335, 73 N.E.2d 679 (1947); *Hegarty v. Curtis*, 121 Ind. App. 74, 95 N.E.2d 706 (1950). In the latter case the reported facts do not appear to justify a reliance on mutuality.

A sufficient number of states have gradually emulated the comparatively radical case law of New York and California on this point to justify the use by recent commentators of the much abused description "trend." See Thames, *Mutuality in Collateral Estoppel: Never the Twain Should Meet*, 37 MISS. L.J. 244 (1966); Comment, *Mutuality of Estoppel: Its Status in Nebraska*, 45 NEB. L. REV. 613 (1966); Note, *Mutuality of Estoppel: McCourt v. Algiers in Context*, 1967 WIS. L. REV. 267.

In contrast to the sweeping pronouncement of *DeWitt*, however, these other state courts have sanctimoniously declared their reverence for the general principle while carving out an ever growing category of so-called exceptions. Justice Traynor has subsequently averred in *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 605, 25 Cal. Rptr. 559, 560, 375 P.2d 439, 440 (1962), that his opinion in *Bernhard* "expressly abandoned" the requirement of mutuality, but the otherwise forcefully worded opinion did at one juncture hedge to the extent of employing the term "exception" and perhaps partially as a consequence of the manner in which that reference is paraphrased in the unofficial report's headnote, most courts have alluded to "the *Bernhard* exception to the doctrine of mutuality." See, e.g., *In re Miller's Estate*, 230 P.2d 667, 677-78 (Cal. Dist. Ct. App. 1951).

9. See *supra* note 8.

10. See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 311-314 (1956).

This reasoning has been extended by recent decisions so that an unfavorable determination of an issue in one action may constitute a valid defense for a second defendant in a second action by the identical plaintiff. A similar conclusion may obtain where the present plaintiff was an unsuccessful defendant in a former judgment. However, this latter defensive variation represents one further step in a progressive departure from the ideal of unrestricted access to the legal tribunals inasmuch as the foreclosed party has had no opportunity to select that forum before which he may most advantageously present his grievance. A smaller number of courts have agreed to sanction that foreclosure.<sup>11</sup>

A parallel situation exists in the affirmative use of estoppel. In their most venturesome attack thus far on mutuality, the California courts permitted a second plaintiff to avail himself of a judgment rendered against a party who had been the plaintiff in the earlier trial.<sup>12</sup> Significantly, in a factual situation similar to *DeWitt*, the same court has since declined to use a judgment adverse to the defendant to aid a second plaintiff.<sup>13</sup> New York, by extending the consequences of a suit for the unsuccessful defendant, now stands virtually along among the states.<sup>14</sup>

Thus, representing as it does the extreme gradation on a scale of possible variations, the factual holding in *DeWitt* supports—if the statement's application is restricted to New York—the comment that mutuality is a dead letter. Evidently the plea of mutuality will not again be raised in its courts.<sup>15</sup> This decisive pronouncement will likely provide a clearer impetus for innovation in other jurisdictions by virtue of its elimination of a dichotomy of authority in New York which had been perpetuated by several less lucid opinions.<sup>16</sup>

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11. For a summary of recent cases see Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).

12. *Hardware Mut. Ins. Co. v. Valentine*, 119 Cal. App. 2d 125, 259 P.2d 70 (1953).

13. *Nevarov v. Caldwell*, 161 Cal. App. 2d 762, 327 P.2d 111 (1958). Immediately prior to *DeWitt* New York courts had been accurately characterized as more conservative in wielding estoppel than their California counterparts. See Note, *Mutuality of Estoppel: McCourt v. Algiers in Context*, 1967 WIS. L. REV. 267, 277.

14. In *Gorski v. Commercial Ins. Co.*, 206 F. Supp. 11 (E.D. Wis. 1962) the federal court purported to apply Wisconsin law in a holding which parallels *DeWitt* but this interpretation appears inaccurate. See Note, *Mutuality of Estoppel: McCourt v. Algiers in Context*, *supra* note 13, at 286, 287. Apparently not all courts choose to recognize the issue. In *Barbour v. Great Atl. & Pac. Tea Co.*, 143 F. Supp. 506 (E.D. Ill. 1956), the court reasoned that since Illinois permits suits for consortium a husband may affirmatively use a personal injury judgment in favor of his wife. Mutuality is not discussed. *DeWitt* is not without precedent in the federal courts. See cases cited notes 22-24 *infra* and accompanying text.

15. See *infra* notes 33, 34 and accompanying text. The court expressly refrained from discussing the situation in which former codefendants confront each other.

16. For an analysis in detail of the "confusing and ambiguous" recent decisions see Note, *Collateral Estoppel in New York*, 36 N.Y.U.L. REV. 1158 (1961).

That an offensive exercise of estoppel was ruled out by two earlier cases, *Elder v. New York & Pa. Express Inc.*, 284 N.Y. 350, 31 N.E.2d 188 (1940), and *Haverhill v.*

The explanation for the demise of mutuality lies in the desirability of shielding former litigants from extended harassment and, of course, in the necessity of clearing crowded dockets.<sup>17</sup> Nonetheless, the fear has been expressed that the offensive use of estoppel, such as was approved in *DeWitt*, is less than a panacea, given the inducement which it may provide to would-be-plaintiffs for whom the burden of a law suit would otherwise prove discouraging.<sup>18</sup> Of course to the extent to which the otherwise sacrificed causes are meritorious, the thrust of this intended criticism has been controverted. In addition, the policy's effectiveness in expediting matters may to some extent be diminished by the incentive which it may create for excessively thorough litigation by defense counsel of inconsequential matters in order to forestall detrimental future use of judgments.<sup>19</sup> The dissenter in *DeWitt* joined numerous commentators who have deplored the possibility that an ostensibly innocuous contest involving minor property damage toward the conduct of which the defense may be reluctant to devote substantial resources may produce ramifications of unforeseen dimensions.<sup>20</sup> Finally, trial of difficult cases by proxy, *i.e.*, by strategic manipulation of the initial party and jurisdiction so as to produce the ideal test case, may become fashionable among zealous personal injury counsel.<sup>21</sup>

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International Ry. Co., 244 N.Y. 582, 155 N.E. 905 (1927), appears to have been the conclusion of several lower courts and the Appellate Division's judgment for the defendant in *DeWitt* had been commended as in accord with the law in Note, 32 BROOKLYN L. REV. 428 (1967). See, *Quatroche v. Consolidated Edison Co.*, 11 App. Div. 2d 665, 201 N.Y.S.2d 520 (1960); *Goodman v. Kirshberg*, 261 App. Div. 257, 25 N.Y.S.2d 13 (1941); *Bisnoff v. Herman*, 260 App. Div. 663, 23 N.Y.S.2d 719 (1940); *Contra*, *Kinney v. State*, 191 Misc. 218, 75 N.Y.S.2d 784 (1947).

The Court of Appeals was able to cite two of its own prior decisions as authority: *Liberty Mut. Ins. Co. v. Colon & Co.*, 260 N.Y. 305, 183 N.E. 506 (1932), and *United Mut. Fire Ins. Co. v. Saeli*, 297 N.Y. 611, 75 N.E.2d 626 (1947). The precedent value of the former is weakened by its disposition under a workmen's compensation statute, the affirmative use being ascribed to legislative intent. The latter ruling countenanced affirmative use in fact but its brief exposition of the subject was sufficiently opaque to permit its dismissal by the lower courts. The court did find it necessary to expressly overrule conflicting authority and one must ultimately conclude that the law of New York has been notably altered.

17. "Behind the phrase *res judicata* lies a rule of reason and practical necessity. One who has had his day in court should not be allowed to litigate the question anew." *Good Health Dairy Corp. v. Emery*, 275 N.Y. 14, 18, 9 N.E.2d 758, 759 (1937) quoted in *B.R. DeWitt Inc. v. Hall*, 19 N.Y.2d 141, 144, 278 N.Y.S.2d 596, 599, 225 N.E.2d 195, 197 (1967). "It is a recognition of the need of finality to litigation . . . a rule of rest" *Haverhill v. International R. Co.*, 217 App. Div. 521 (1926), *aff'd*, 244 N.Y. 582, 155 N.E. 905 (1927).

18. *Thames*, *Mutuality supra* note 8.

19. The most widely cited defenses of mutuality appear in *von Moschzisker supra* note 2, and *Moore & Currier supra* note 5.

20. *B.R. DeWitt Inc. v. Hall*, 19 N.Y.2d 141, 149, 278 N.Y.S.2d 596, 602, 225 N.E.2d 195, 199 (1967) (dissenting opinion) and authorities cited therein.

21. This phenomenon has evidently been observed on occasion in California. *See*, *Nevarov v. Caldwell*, 161 Cal. App. 2d 762, 327 P.2d 111 (1958).

The experience of a few federal courts which have pioneered in allowing the affirmative employment of collateral estoppel so as to serve public advantage probably indicates the disposition to be made of these newly spawned difficulties. The Second Circuit's opinion in *Zdanok v. Glidden Co.*,<sup>22</sup> resembling that of *DeWitt*, cautiously limited its holding to the facts at bar and the court refused to apply this holding to a later case on the grounds of factual dissimilarity since the amount in controversy was not great, the defendant had not litigated extensively, appealed, nor had any knowledge of the impending second suit.<sup>23</sup> A district court has applied the bar of estoppel to a subsequent case by virtue of its having been "litigated to the hilt by the most competent lawyers,"<sup>24</sup> a consideration expressly mentioned in *DeWitt*.<sup>25</sup> In so holding the federal judiciary have not adopted inflexible rules of law which categorically discard collateral estoppel where the party against whom the judgment is invoked lacked the initiative in the original contest or where the issue had been decided by a jury rather than a judge.

This case by case approach has garnered some vigorous approval<sup>26</sup> and its adoption by New York and other states seems quite probable. In a very influential New York decision,<sup>27</sup> the defensive use of mutuality was spurned and "identity of issues" was reputed to be the criterion for application of estoppel. While the extent to which this may constitute the sole criterion has remained in question,<sup>28</sup> one recent decision<sup>29</sup> would seem to evince some predisposition on the court's part to consider all of the circumstances involved.

In the process of invalidating conflicting earlier precedent the *DeWitt* opinion pointedly declined to overrule all such cases. Direct reference was made to only one such decision,<sup>30</sup> which was struck down "because its outcome was dictated by want of mutuality."<sup>31</sup> This hesitancy may be construed as an implicit indication that some of the results achieved in another era through mutuality may survive the doctrine itself where desirable and, presumably, this ideal would necessarily be attained

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22. 288 F.2d 99 (2d Cir. 1961).

23. *Berner v. British Com'wth, Airlines*, 346 F.2d 532 (2d Cir. 1965).

24. *United States v. United Airlines Inc.*, 216 F. Supp. 709, 728 (E.D. Wash. 1962).

25. *B.R. DeWitt Inc. v. Hall*, 19 N.Y.2d 141, 148, 278 N.Y.S.2d 596, 601, 225 N.E.2d 195, 199 (1967).

26. *Currie, Civil Procedure, supra* note 11; *Thames, Mutuality, supra* note 8.

27. *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956).

28. Note, 32 BROOKLYN L. REV. 428 (1967).

29. *Cummings v. Dresher*, 18 N.Y.2d 105, 271 N.Y.S.2d 976, N.E.2d 688 (1965).  
Noted, 41 ST. JOHN'S L. REV. 148 (1966).

30. *Haverhill v. International Ry. Co.*, 244 N.Y. 353, 155 N.E. 905 (1927). See note 16 *supra*.

31. *B.R. DeWitt Inc. v. Hall*, 19 N.Y.2d 141, 147, 278 N.Y.S.2d 596, 601, 225 N.E.2d 195, 198 (1967).

by a weighing of the equities of each case.<sup>32</sup>

One additional factor suggests the undesirability of indulging in a blind application of estoppel whenever the issues presented are identical; if a defendant were found negligent while his co-defendant were held blameless, mutuality prevents use of that decision in a subsequent action by the latter against the former.<sup>33</sup> However, under the identical issue doctrine, the earlier decision is controlling.<sup>34</sup> Manifestly in some instances the co-defendants are preoccupied with the common adversary and fail to raise factors relevant to a dispute among themselves. While a solution may be found in the assertion that negligence as to the plaintiff was the initial issue and therefore the identity requisite is not met, the circumstantial analysis introduced by the federal courts represents an effective method of disposition.

The one material consequence of the demise of mutuality which is not readily amenable to solution is so-called multiple claimant anomaly. Although the judgments against a defendant such as a common carrier may be numerous in the event of an accident, the requirement of due process dictates that each victim be permitted to try the question anew. Nonetheless, should any one in a long succession of attempts prove successful—and the “law of averages” suggests the likelihood of an occasional aberration in any such series—the hapless carrier forfeits all future suits notwithstanding repeated prior demonstrations of proper conduct.

While one's instinctive reaction to the inequity may often be mollified by the defendant's corporate identity, the emotions of those claimants who emerged from court penniless and now look on in horror as others suddenly collect handsome sums without effort must also be considered. The scholar may dismiss such inconsistency as an implicit consequence

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32. This analysis must face one factual hurdle. *Haverhill v. International Ry. Co.*, 244 N.Y. 353, 155 N.E. 905 (1927) which rejected affirmative use of estoppel, was expressly overruled. Yet the Appellate Division stressed that the defendant had been sued in an inferior court on a small claim and had not actively defended himself. The *DeWitt* opinion declined to list *Elder v. New York & Pa. Express Inc.*, 284 N.Y. 350, 31 N.E.2d 188 (1940), as overruled although the immediately preceding paragraph had been devoted to a discussion of *Elder* and *Haverhill*. In *Elder*, which also denied a third party plaintiff's plea of estoppel, the defendant had been cast in the role of plaintiff in the prior action, and as the dissent pointed out, the case appears from the reports to have been actively contested. Thus application of the suggested approach appears on the surface to yield a result diametrically opposed to that which could be argued to be implicit in the opinion. On balance, however, it appears most likely that the court did not have the particular fact situation uppermost in mind and overruled *Haverhill* for the very reason indicated, viz., the opinion appeared to rely on mutuality as such.

33. *Glaser v. Hette*, 232 App. Div. 119, 249 N.Y. Supp. 374, *aff'd*, 256 N.Y. 686, 177 N.E. 193 (1931); *Minkoff v. Brenner*, 10 N.Y.2d 1030, 225 N.Y.S.2d 47, 180 N.E.2d 434 (1962).

34. *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956).

of our Anglo-American trial system in which the inhabitants of a less than ideal society content themselves with having had "a sporting chance" at justice. This contention, however, provides no relief to the populace, who are requested to place their collective trust in institutions containing such glaring imperfections.

As previously suggested a court may closely scrutinize the factual posture of each case and grant the plea of estoppel with selectivity. The court could forthrightly identify the multiple claimant anomaly as its ratio decidendi. This represents the least complex approach. Regrettably it can not be purported to in any way expedite the efficient administration of litigation. Moreover, denial of the plea in those instances in which a verdict favorable to the plaintiff has been delivered subsequent to at least one other trial in which the defendant has been exculpated may be received as a tacit admission of the dubious propriety of a decision.

A more elaborate solution has for various reasons found favor with several academicians:<sup>36</sup> courts and legislatures should sanction broader employment of some form of compulsory joinder. Given the unwieldy numbers concerned, the fictional or "spurious" class action seems ideal; a Supreme Court dictum has asserted the constitutionality of binding all would-be claimants,<sup>37</sup> assuming adequate representation and fair notice.

Nonetheless, no such remedy has been adopted by any state or federal jurisdiction. Under section 23 of the Federal Rules of Civil Procedure, any party wishing to remain exempt may do so. A few federal decisions<sup>38</sup> have authorized class members to intervene subsequent to judgment, which, it will be noted, represents still another form of repudiation of mutuality. These class rules, however, due to their voluntary nature fail to perform the role which might be theirs. Indeed, by recent amendment all potential members are notified of pending action and only those who file an indication of their intention to remain unbound will be so held. Determination of these parties' status is made prior to the judgment and thus even the limited utility of subsequent intervention is apparently no longer of pertinence.<sup>39</sup> Similarly, that minority of states which do recognize the spurious class action adhere to federal procedure

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35. *Hansberry v. Lee*, 311 U.S. 32 (1940); discussed in 3 J. MOORE, FEDERAL PRACTICE § 23.11 (2d ed. 1948).

36. Simeone, *Procedural Problems of Class Suits*, 60 MICH. L. REV. 905 (1960); Van Dercreek, *The "Is" and "Ought" of Class Actions under Federal Rule 23*, 48 IOWA L. REV. 273 (1963).

37. *Hansberry v. Lee*, 311 U.S. 32 (1940).

38. *Union Carbide Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1962); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D. Ill. 1959).

39. See Simon, *Class Actions under Amended Rule 23*, 12 ANTITRUST BULL. 187 (1967).



in not binding absentee parties.<sup>40</sup>

The class action operates harshly in forcing one's acquiescence to the opinion of others as to trial tactics. A representative plaintiff must be selected. Collusive suits sacrificing the rights of the remainder of the class constitute a hazard. To the extent to which collateral matters differ with each claimant, additional subsequent litigation may ensue, and to the extent to which such matters are included, the greater the complexities to be fathomed by a jury.<sup>41</sup>

In addition, it has been prophesied that in combination with the contingent fee such rules would create "an unseemly rush to bring the first case and provide, through notice to all injured persons, a kind of legalized ambulance chasing."<sup>42</sup> One commentator on the class action in New York has, in fact, concluded that the innovation of class actions in the negligence field is unwarranted in view of what does, as a matter of record, appear to be a reasonably comforting paucity of serious problems.<sup>43</sup> This comment, of course, antedates the potential situation created by *DeWitt* and, while stressing the apparent natural tendency toward voluntary referral to specialist attorneys with the concomitant consolidation of actions, its author, nonetheless, applauds the action of a New York lower court in requiring several plaintiffs to consolidate their negligence actions against a bus company.<sup>44</sup> It is recognized that even without statutory mandate courts have wide discretion in consolidating actions which have already been filed<sup>45</sup> and an increasing willingness to exercise that power, even to the extent of reaching different jurisdictions within a given state,<sup>46</sup> has been necessitated by rising accident rates. Liberalization of class action procedure may be defended as a mere extension of this tendency.

At present the multiple claimant anomaly exists merely by virtue of the facile imaginations of a spate of writers who have chosen to direct passing attention to it in hypothetical fashion. The appearances of this

40. For a list of cases see Simeone, *Procedural Problems*, *supra* note 37 at 920.

41. General discussions of the class action appear in Van Dercreek, *The "Is" and "Ought" of Class Actions under Federal Rule 23*, *supra* note 37; Simeone, *Procedural Problems*, *supra* note 37; and *Developments in the Law -- Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874 (1950).

42. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 469 (1960).

43. *Id.* at 469.

44. *Chudyk v. Fifth Avenue Coach Lines*, 6 App. Div. 2d 1003, 177 N.Y.S.2d 981 (1958).

45. See, e.g., *Trusler v. Galambos*, 238 Ind. 195, 149 N.E.2d 550 (1958): "The rule is well settled . . . that trial courts do have the inherent power to consolidate causes in proper cases to expedite administration of justice." *Id.* at 200, 149 N.E.2d at 552.

46. See, e.g., *Balz v. Kauffman and Minter, Inc.*, 285 App. Div. 1206, 140 N.Y.S.2d 902 (1955); *Rubenstein v. Silbert*, 200 Misc. 399, 106 N.Y.S.2d 304 (1951).

phenomenon may perhaps be rare, particularly in view of the club which one or a series of judgments would represent in the hands of the successful defendant who insures against future suits by extrajudicial settlement. The consequence of this remoteness is the unlikelihood of anticipatory procedural reform whatever the theoretical merit of such proposals, although evidence of manipulation in the bringing of test cases could prove a more compelling prod for action. To the extent to which the objective of the *DeWitt* case is attained, possible public outrage at the multiple claimant problem must be balanced against one very present reality: popular alienation inspired by the several years delay common to trials and appeals.

In repudiating in its entirety the doctrine of mutuality of estoppel, New York has dislodged an anachronism dating back to an era in which rules occasionally existed simply for the sake of rules and which, through indiscriminate application, created that particular brand of injustice which is born of duplication and delay. In its stead should be substituted a rule of judicial discretion directed to the relevant facets of each case.

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